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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 489

UTAH PIE COMPANY, *Petitioner*

v.

CONTINENTAL BAKING COMPANY, CARNATION COMPANY, and PET MILK COMPANY, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR PET MILK COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not yet reported in the Federal Reporter. It is reported in 1965 Trade Cases (CCH) ¶ 71,468. It also appears in Appendix A to the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The Seventh Amendment to the Constitution and Rule 50, Federal Rules of Civil Procedure, Motion for Directed Verdict, govern the disposition of the Petition.

The Seventh Amendment is as follows:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rule 50 is as follows:

> (a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.
>
> (b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed ver-

dict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

QUESTIONS PRESENTED

Should the Supreme Court of the United States grant certiorari when the sole ground for reversal, by a federal Court of Appeals, of a judgment based upon a jury verdict is "that the evidence was insufficient to support the verdict in favor of Utah Pie [petitioner], or warrant the injunction"? (Petition, Appendix A, pp. 3-4.)

Does Amendment Seven of the United States Constitution preclude a review of the evidence by an appellate court, and reversal of a judgment entered on a jury verdict, with instruction to the trial court to enter a judgment contrary to the verdict?

STATEMENT OF THE CASE

A complaint was filed by Utah Pie Company, petitioner, in the United States District Court for the District of Utah on September 8, 1961, against Pet Milk Company, on whose behalf this brief is filed,

Continental Baking Company, and Carnation Company. The complaint alleged a conspiracy among the defendants in violation of Section 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1. The complaint also alleged that each defendant had independently violated Section 2(a) of the Clayton Act, as amended, 49 Stat. 1526, 15 U.S.C. § 13(a), through the sale of frozen fruit pies in Utah and neighboring states at prices lower than the prices charged for the pies in other states.

The trial of the case, before a jury, began February 4, 1963, ended on February 22, 1963, and occupied 17 days. The transcript of the testimony and arguments of counsel covered almost 2,700 pages. Some 65 exhibits were introduced on behalf of Utah Pie in presenting its case against Pet Milk Company; and some 22 exhibits were introduced by Pet. On February 23, 1963, the jury returned a verdict in favor of the three defendants on the alleged violation of Section 1 of the Sherman Act. The jury also returned verdicts in favor of the plaintiff, Utah Pie Company, and against each defendant on the alleged violations of Section 2(a) of the Clayton Act. (Transcript of Record, pp. 1283-1284.)

At the close of the evidence offered by Utah Pie, Pet moved for a directed verdict, in accordance with Rule 50(a), Federal Rules of Civil Procedure, on the ground of insufficiency of the evidence. Thereafter, on the denial of this motion and within 10 days after the reception of the unfavorable verdict on the Section 2(a) charges, Pet moved, under Rule 50(b), for entry of judgment in accordance with its motion for a directed verdict. This motion was also denied by the trial court, and judgment against Pet on the

alleged violation of Section 2(a) was entered on February 23, 1963. Similar procedures were followed by the other two defendants. (Petition, Appendix A, pp. 1-3.)

Timely appeals were taken by the defendants, in separate cases, to the Court of Appeals for the Tenth Circuit. (*Ibid.*) The three cases were consolidated for purposes of printing the record, although each appellant compiled its own exhibit book, filed its own briefs, and made its own oral argument. In addition to a "consolidated" exhibit book, the appellee, Utah Pie Company, filed a separate exhibit book in each of the three cases. The Transcript of the Record, printed for the appeal, included the entire testimony taken at the trial. Some 69 exhibits, a few containing as many as 125 pages, were made a part of the record in the Pet appeal, either by Utah Pie or by Pet.

The three appeals were argued before Chief Judge Murrah, and Judges Phillips and Lewis on July 11, 1964. Thereafter, the study of the transcript, exhibits, and briefs, and the writing, by Judge Phillips, of the Court's opinion occupied the three judges for almost 11 months. The opinion, in its original form, is 109 pages in length, with an additional 13 pages of appendices. (Petition, Appendix A, pp. 1-87.)

On the basis of this extensive record and its thorough study, the Court of Appeals unanimously reversed the judgments "in favor of Utah Pie Company on its 2(a) claims," and remanded the causes "with instructions to enter judgment for the defendants." (Petition, Appendix B, p. 89.)

ARGUMENT

The petition for the writ of certiorari should be denied because petitioner has failed to present an unresolved or novel question of law or any question of sufficient importance to justify the issuance of a writ. The unanimous reversal of the judgment by the Court of Appeals, based on prolonged study of a lengthy record, was solely on the ground of insufficiency of the evidence.

No question of constitutional law is presented, although the existence of such a question is suggested on page 5 of the Petition. This question has long since been resolved against the stand taken by the petitioner, as will be shown later.

No conflict with decisions of this Court or with decisions of other Circuits is presented, although at several points the Petition attempts to suggest the existence of conflicts. See Petition, pp. 42, 43, 45, 47, 48, and 49. No such conflict exists. Indeed, if a Court of Appeals has applied the correct principles of law in determining the sufficiency of the evidence, there can be no conflict between Circuits unless two Courts of Appeals consider the same body of evidence in connection with the same legal question.

This case rests entirely upon its own facts, and no question of importance to litigants other than Utah Pie Company and Pet Milk Company is presented.

1. The Supreme Court Does Not Grant Certiorari To Review the Evidence

Since the sole ground for the reversal of the judgment against Pet Milk Company is the insufficiency of the evidence to support the jury's verdict, this Court, if it grants certiorari, would have to make its own

review, of the testimony and exhibits. In 1925, the Court said flatly, "We do not grant a certiorari to review evidence and discuss specific facts." *U. S.* v. *Johnson,* 268 U.S. 220, 227.

For the Court to undertake such a review in the present case would conflict with the statement in the *Johnson* case. It would also be contrary to a view expressed recently by the Court for the need for assistance by Courts of Appeals in antitrust cases.

U. S. v. *Singer Mfg. Co.,* 374 U.S. 174 (1963), came to this Court directly from the District Court, Southern District of New York, under the Expediting Act, 58 Stat. 272, 15 U.S.C. § 29. In the opinion, Mr. Justice Clark said:

> "We have examined the record (1,723 pages) in detail, as is necessary in these direct appeals[1] . . ." (374 U.S. at 175.)

In the footnote he continued:

> "1. Whatever may have been the wisdom of the Expediting Act in providing direct appeal in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. See, *e.g.,* Gesell, A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases, in 1961 N. Y. State Bar Association Antitrust Law Symposium 98 (CCH). Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals." (*Ibid.*)

Mr. Justice Harlan, dissenting in the *Singer* case, commented favorably on the content of footnote 1 as follows:

> "In conclusion, it is gratifying to observe the Court's recognition of the fact that the require-

ment of direct review in cases like this has become an anachronism in light of the modern work load of this Court. *Ante* note 1; see also the separate opinion of this writer in *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 357, 364-365. The final outcome of this case might indeed have been different had this Court had 'the valuable assistance of the Courts of Appeals' (*ante,* note 1)." (374 U.S. at 202.)

In the separate opinion in *Brown Shoe,* Mr. Justice Harlan spoke of the need "of relieving this Court of the often arduous task of searching through voluminous trial testimony and exhibits to determine whether a single judge's findings of fact are supportable"; and of "leaving this Court free to exercise its certiorari power with respect to particular cases deemed deserving of further review." 370 U.S. at 364, 365.

Mr. Justice Frankfurter commented more generally on review of evidence by the Supreme Court in his dissenting opinion in *Dick* v. *New York Life Ins. Co.,* 359 U.S. 437, 447 (1959). The justice was discussing the history of the establishment of the Circuit Courts of Appeals. Two statements are particularly relevant. At page 452, testimony of Chief Justice Taft at a hearing of the Committee on the Judiciary, House of Representatives, before the passage of the Judiciary Act of February 13, 1925, 43 Stat. 936, is quoted. The testimony is as follows:

"'No litigant is entitled to more than two chances, namely, to the original trial and to a review, and the intermediate courts of review are provided for that purpose. When a case goes beyond that, it is not primarily to preserve the rights of the litigants. The Supreme Court's function is for the purpose of expounding and stabilizing prin-

> ciples of law for the benefit of the people of the country, passing upon constitutional questions and other important questions of law for the public benefit. It is to preserve uniformity of decision among the intermediate courts of appeal.' "

Later Mr. Justice Frankfurter said:

> "It is the staple business of Courts of Appeals to examine records and sufficiency of evidence. To undertake an independent review of the review by the Court of Appeals of evidence is neither our function nor within our special aptitude through constant practice . . . [T]he judges of the Court of Appeals are, by the very nature of the business with which they deal, far more experienced than we in dealing with evidence, ascertaining the facts, and determining the sufficiency of evidence to go to a jury." (359 U.S. at 461-462.)

The application of all these statements to this petition for certiorari is abundantly clear. In a private treble-damage antitrust case, the Supreme Court need not grant review, as it must under the Expediting Act. Having had the "valuable assistance" of a Court of Appeals, there is no reason for the Supreme Court to undertake the "arduous task of searching through voluminous trial testimony and exhibits . . ."

The cases cited by petitioner to support the claim that the Court of Appeals had no authority to review the evidence do not, in fact, support the claim. *Gunning* v. *Cooley,* 281 U.S. 90 (1930), states the principles enunciated by the Court of Appeals for the Tenth Circuit in the instant opinion. Compare 281 U.S. at 93-94 and Petition, Appendix A, pp. 51-52. With one exception, the other cases cited on pages 51 and 52 of the Petition were brought under the Federal Employer's Liability Act, 35 Stat. 65, 36 Stat. 291, 53 Stat. 1404, 45

U.S.C. § 51 *et seq.*, or a related statute, the Jones Act, 38 Stat. 1185, 41 Stat. 1007, 46 U.S.C. § 688. This Court has, in seeming contradiction to its usual ruling, frequently granted certiorari to review evidence of negligence, in cases brought under these liability statutes, but not without expressions of dissenting views. See *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 111-112 (1959).

The exception is *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555 (1931), a treble-damage action based on an alleged violation of Section 1 of the Sherman Act. The Court's opinion in this case does not sustain the statement for which it is cited as authority, namely, "Appellate Courts are not to search the record to take cases away from the jury." (Petition, pp. 51-52.) Nevertheless, a casual reading of the opinion might make it appear that the Supreme Court was concerned in the *Story Parchment* case solely with the sufficiency of the evidence. A critical reading of the opinion and that of the Court of Appeals for the First Circuit, 37 F. 2d 537 (1930), however, shows that a question of law was before the Court. That question dealt with the kind of evidence that would sustain a treble-damage plaintiff's claim of damage to its business or property. The Court of Appeals, with one judge dissenting vigorously, had held that the plaintiff's evidence was too speculative to sustain its burden of proof. (*Id.* at 539.)

This Court discussed the point at some length, 282 U.S. at 561-566, and expressed the general rule as follows:

> "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of

fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making amends for his acts." (*Id.* at 563.)

2. The Court of Appeals Applied Correct Legal Principles in Determining the Sufficiency of the Evidence

Judge Phillips, speaking for the Tenth Circuit, correctly stated the applicable rules of law when he said:

> "A trial court, in determining whether it will grant a motion for a directed verdict or for judgment n.o.v., should view the evidence in a light most favorable to the party against whom the motion is directed and give such party the benefit of all the inferences which the evidence reasonably supports, even though contrary inferences might reasonably be drawn therefrom, and if the evidence and inferences, so viewed and considered, are of such a character that reasonable men in the exercise of a fair and impartial judgment may reach different conclusions, the motion should be denied. In reaching its determination 'the court may not pass on the weight of the evidence or' decide 'where the preponderance of the evidence lies. With the exception of clearly incredible evidence, the court should not consider or pass on the credibility of witnesses and should accept as true the evidence in favor of the party against whom the motion is directed.' In determining whether the motions by the defendants in the instant cases should have been granted, we have so viewed and considered the evidence." (Petition, Appendix A, pp. 51-52. Footnotes omitted.)

In his discussion of the evidence Judge Phillips frequently used such words as "undisputed" and "uncontroverted." See the following examples:

> "The evidence in these cases covers the period 1958 to 1961, both inclusive. It is free from sub-

stantial dispute, except for a few statements of opinions or conclusions not based on any substantial underlying proof.

"The offering prices, selling prices, sales volumes, percentages of market shares, earnings, and other like matters; the tables and charts which appear in this opinion; and the appendices annexed hereto are all based on uncontroverted documentary evidence, some of which was introduced by the plaintiff and some by the defendants." (Petition, Appendix A, p. 4.)

* * *

". . . It was clearly established by uncontradicted and uncontroverted evidence that Safeway was not willing in those years to purchase frozen fruit pies from Utah Pie . . ." (*Id.* at 26.)

* * *

". . . because uncontradicted evidence clearly established (1) that the reduced price at which they were sold [Bel Air pies were sold by Pet to Safeway] was fully cost justified . . ." (*Id.* at 61.)

Finally, commenting on the difficulty a jury might have had in weighing the evidence on the multiple claims before it Judge Phillips said:[1]

"Utah Pie's conspiracy claim and § 2(a) claims and Continental's counterclaim were all tried at the same time. The portions of the evidence pertinent to all of such claims and the portions pertinent only to a particular claim were commingled and presented to the jury in mass. The jury's task of determining what evidence was pertinent to all of the claims and segregating those portions of the evidence pertinent only to the particular claims, respectively, was a most difficult if not an

[1] A conspiracy claim, three alleged violations of Section 2(a) of the Clayton Act, and a counterclaim by Continental Baking Company, which alleged a violation of Section 2(a) by Utah Pie.

impossible one. *Indeed, we found it very difficult so to do, when we had the printed transcript of the oral evidence and the written exhibits (either original or reproduced) before us, the benefit of the written briefs, and were able to proceed with due deliberation.*" (*Id.* at 73. Emphasis supplied.)

3. Petitioner Argues the Merits of the Court of Appeals' Determination

As noted above, the Petition does not present a question of law to warrant the issuance of a writ of certiorari. Instead, the Petition makes the same arguments made in the trial court, and in the appellee's brief and oral argument in the Court of Appeals. The Petition selects isolated bits from the evidence received in the trial court, and fully considered by the Court of Appeals. The Petition characterizes these bits in cloak-and-dagger antitrust cliches. Then the Petition states flatly that these isolated bits support the jury's verdict, or create an irrebuttable presumption in the petitioner's favor. All of this is to be done without consideration of the evidence as a whole. The Petition even demeans the effort made by the Court of Appeals to look at the evidence as a whole. (Petition, p. 6.)

To illustrate, the Petition speaks of "prolonged below-cost sales of frozen fruit pies" by Pet, inferring that such sales were made only in Utah Pie's market and with predatory intent. (Petition, pp. 25, 40.) The testimony of Pet Milk Company's controller, much of it dealing with budgetary matters and Pet's losses on frozen fruit pies, covered 168 pages of the transcript of the trial proceedings, when he testified as an adverse witness called by the plaintiff (Utah Pie), and 66 pages, when he testified as a witness for defendant Pet. (Transcript of Record, pp. 331-401, 802-832.)

Other relevant testimony covers more than 30 pages of the transcript of proceedings. (Transcript of Record, pp. 922-937, 941-942, 957-958, 963-965.) In addition 10 exhibits are relevant to the subject of Pet's losses, and to the reasons the losses were sustained. Exhibits A-32 and A-33, introduced by Pet, and Plaintiff's Exhibits 2 (six Annual Reports of the Pet Milk Company), 7a, 7b, 21 (four pages of profit and loss statements of the company), 27, 30 (11 pages), 31, and 124.

On the basis of its study of the testimony and exhibits, the Court of Appeals rationally discussed Pet's experience in the frozen fruit pie industry, and found losses but no predatory intent. (Petition, Appendix A, pp. 13-17, 59, 60-62.) The worst that the Court found was that the operations of the defendants, including Pet, "in some respects, lacked efficiency." (*Id.* at 59.) Should this Court undertake a review of the evidence on the question of "intentional, prolonged below-cost sales," it could only come to the conclusion reached by the Court of Appeals.

Numerous other examples of erroneous characterizations could be given, if this case were before the Court on the merits.

4. Amendment Seven, United States Constitution, Does Not Preclude a Review of the Evidence by an Appellate Court, and Reversal of a Judgment Entered on a Jury Verdict, With Instruction to the Trial Court To Enter a Judgment Contrary to the Verdict

To contend, as petitioner does on page 51 of the Petition, that the "action of the Trial Court [sic, Court of Appeals] in reversing a jury verdict, in effect, deprived petitioners [sic] of a trial by jury contrary to the Seventh Amendment of the Constitution" is to ask

a return to some early period in legal history. Commenting on the Seventh Amendment in 1838, the Supreme Court said that after a jury verdict, a party "has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of his case." *Hepburn* v. *Dubois*, 12 Pet. 345, 376, 9 L. ed. 1111, 1123 (1838).

Whether under the Seventh Amendment a court of error, on finding a jury verdict not supported by the evidence, could instruct a trial court to enter judgment notwithstanding the verdict, was at one time subject to some confusion. The confusion that existed, however, was clarified by Rule 50(b), Federal Rules of Civil Procedure.

The history of the rule and its relation to the power of federal courts to enter judgment notwithstanding a verdict have been briefly and clearly summarized for this Court by Mr. Justice Black in *Johnson* v. *New York, New Haven & Hartford Railroad Co.*, 344 U.S. 48 (1952), as follows:

> "The rule carefully sets out the steps and procedures to be followed by the parties as a prerequisite to entry of judgments notwithstanding an adverse jury verdict. *Montgomery Ward & Co.* v. *Duncan*, 311 U.S. 243, 250. It was adopted following confusion in this field brought about in part by three cases decided by this Court, *Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364; *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U.S. 654; and *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389. The *Slocum* case was understood to hold that the Seventh Amendment forbade United States courts to enter judg-

ments in favor of one party after jury verdict in favor of the other. The *Redman* case tried in New York held that the Seventh Amendment did not forbid entry of judgment notwithstanding a verdict where, prior to the verdict, the trial judge, following New York procedure, had expressly reserved his decision on a motion for a directed verdict. The New York District Court was authorized to follow this state practice because of the Conformity Act, R. S. (1878) § 914. Thus the *Redman* case did not purport to adopt New York procedure for the general guidance of federal courts. Later the *Kennedy* case cast doubt on the *Redman* holding, at least as to its scope. In the *Kennedy* case plaintiff's request for directed verdict had not been followed by a timely motion for judgment notwithstanding the verdict as required by Pennsylvania law. Failure to conform to this Pennsylvania practice was a reason given by this Court for finding lack of power in the District Court to enter judgment contrary to the verdict.

"Rule 50(b) was designed to provide a precise plan to end the prevailing confusion about directed verdicts and motions for judgments notwithstanding verdicts. State procedure was no longer to control federal courts as it had in the *Redman* and *Kennedy* cases. Federal courts were to be guided by this new rule, which provided its own exclusive procedural program. It rejected the New York procedure applied in the *Redman* case, which permitted judgment to be set aside even though no motion to do so had been filed after verdict. Instead it approached more closely the Pennsylvania rule, relied on in the *Kennedy* case, under which judgments contrary to verdicts would not be awarded in the absence of specific timely motions for them. But Rule 50(b) departed from the New York and Pennsylvania procedures by making it wholly unnecessary for a judge to make an express reservation of his decision on a motion for

> directed verdict. The rule itself made the reservation automatic. A court is always 'deemed to have submitted the action to the jury subject to a later determination' of the right to a directed verdict if a motion for judgment notwithstanding the verdict is made 'within 10 days after the reception of a verdict . . .' This requirement of a timely application for judgment after verdict is not an idle motion. This verdict solves factual questions against the post-verdict movant and thus emphasizes the importance of the legal issues. The movant can also ask for a new trial either for errors of law or on discretionary grounds. The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness. See *Cone* v. *West Virginia Pulp & Paper Co., supra* [330 U.S.] at 217-218." (344 U.S. at 51-53. Footnote omitted.)

Commenting on what was said to be the practice of the Second Circuit, "for the clerk to include in his mandate a direction to the District Court to have a judgment entered in favor of a party notwithstanding the verdict," without such an instruction having been issued by the Court of Appeals itself, this Court in a footnote in its *Johnson* opinion said:

> "Since the adoption of Rule 50(b) in 1938, courts of appeals wishing to enter or direct judgment have said so in clear, simple and mandatory language." (344 U.S. at 55, footnote 3.)

Respondent, Pet Milk Company, has complied with Rule 50(b). The Court of Appeals for the Tenth Circuit has exercised discretion in determining whether or not to enter judgment notwitstanding the verdict or to order a new trial. Its decision, "that the judgment in favor of Utah Pie on its § 2(a) claims is reversed and

the causes are remanded with instructions to enter judgment for the defendants" (Petition, Appendix B, p. 89) is stated "in clear, simple and mandatory language."

During recent terms, this Court has consistently denied certiorari when the question has been whether or not the right to a jury trial in civil cases, under the Seventh Amendment, is denied by entry of a judgment notwithstanding a jury verdict. See for example *Eckstrom* v. *Reading Police Home Association of Reading, Pa.*, 375 U.S. 214 (1963); *Ross* v. *Great Northern Railway Company*, 375 U.S. 823 (1963); *Byram Concretanks, Inc.* v. *Warren Concrete Products Co. of N.J.*, 377 U.S. 916 (1964); *Cuddy* v. *Western Maryland Railway*, 379 U.S. 840 (1964); *Bailey* v. *The New York Central Railroad Company*, 379 U.S. 935 (1964); and *McFarlin* v. *Chicago, Rock Island and Pacific Railroad Company*, 379 U.S. 1001 (1965).

The *McFarlin* case is very similar to the present. The trial court, the District for the District of New Mexico, had denied the defendant's motions for directed verdict and for entry of judgment notwithstanding the jury verdict for the plaintiff. On appeal, the Court of Appeals for the Tenth Circuit reversed the trial court, with instructions to enter judgment n.o.v. for the defendant. *Chicago, Rock Island and Pacific Railroad Company* v. *McFarlin*, 336 F. 2d 1, 3 (10th Cir. 1964). The petition for a writ of certiorari raised the question under the Seventh Amendment that is suggested by the present Petition. (See the petition in Case No. 721, October Term, 1964.) Certiorari was denied, 379 U.S. 1001 (1965).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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